

## DOUBLE JEOPARDY — Introduction.....Revised 10/2009

The double jeopardy clause provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." U.S.C.A., Const. Amend. V. The double jeopardy clause applies to the states through the Fourteenth Amendment. *Benton v. Maryland*, 395 U.S. 784, 794 (1969).

[T]he Fifth Amendment double jeopardy guarantee serves principally as a restraint on courts and prosecutors. The legislature remains free under the Double Jeopardy Clause to define crimes and fix punishments; but once the legislature has acted courts may not impose more than one punishment for the same offense and prosecutors ordinarily may not attempt to secure that punishment in more than one trial.

*Brown v. Ohio*, 432 U.S. 161, 165 (1977).

In addition, Article 2, § 10 of the Arizona Constitution provides that "[n]o person shall be . . . twice put in jeopardy for the same offense." A.R.S. Const. Art. 2 § 10. Ordinarily, Arizona courts treat Article 2, § 10 of the Arizona Constitution as providing the same scope of protection as the U.S. Constitution. *Pool v. Superior Court*, 139 Ariz. 98, 108, 677 P.2d 261, 271 (1984).<sup>1</sup>

The Fifth Amendment's double jeopardy clause has been interpreted to provide three types of protection:

- (1) against a second prosecution for the same offense after an acquittal;
- (2) against a second prosecution for the same offense after a conviction; and
- (3) against multiple punishments for the same offense.

*North Carolina v. Pearce*, 395 U.S. 711, 717 (1969), *overruled on other grounds*, *Alabama v. Smith*, 490 U.S. 794 (1989); *Taylor v. Sherrill*, 169 Ariz. 335, 819 P.2d 921 (1991).

The first two protections are against multiple prosecutions, while the third protection is against multiple punishments. In *Pearce*, the Supreme Court held that when a defendant has had his original conviction set aside on appeal, if he is re-convicted on retrial, he must be given credit for all of the time he had already served under the original sentence. Otherwise, a defendant could receive more than the maximum sentence imposable for the crime. *Id.* at 718.

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<sup>1</sup> In *Pool v. Superior Court*, the court clearly states that interpretation of Article 2 § 10 of the Arizona Constitution normally will conform to United States Supreme Court interpretation of the same clause in the federal constitution. However, while acknowledging the desirability of uniformity, the court reserves its power to interpret the state constitution and cautions against blindly following federal precedent when interpreting "our own organic law." *Pool v. Superior Court*, 139 Ariz. 98, 108, 677 P.2d 261, 271 (1984).

When a defendant is prosecuted for both greater and lesser-included offenses, the bar against double jeopardy is applicable and the sequence of the prosecutions is immaterial. *Brown v. Ohio*, 432 U.S. 161, 168 (1977). Once the defendant has been found guilty of or acquitted on a lesser-included offense, the defendant may not be charged with the greater offense, even if the conviction or acquittal of the lesser-included offense was in a court that did not have jurisdiction to hear the greater offense. *State v. Mounce*, 150 Ariz. 3, 5, 721 P.2d 661, 663 (App. 1986).